

compensation arrangements for this traffic through interconnection agreements, and to define the scope of charges by mutual agreement or, if relevant, arbitration.

d. Other Issues

(i) Interconnection and Traffic Exchange

972. *Use of Section 251(c)(2) Interconnection Arrangements.* Although we bring all VoIP-PSTN traffic within section 251(b)(5), and permit compensation for such arrangements to be addressed through interconnection agreements, we recognize that there is potential ambiguity in existing law regarding carriers' ability to use existing section 251(c)(2) interconnection facilities to exchange VoIP-PSTN traffic, including toll traffic. Consequently, we make clear that a carrier that otherwise has a section 251(c)(2) interconnection arrangement with an incumbent LEC is free to deliver toll VoIP-PSTN traffic through that arrangement, as well, consistent with the provisions of its interconnection agreement. The Commission previously held that section 251(c)(2) interconnection arrangements may not be used solely for the transmission of interexchange traffic because such arrangements are for the exchange of "telephone exchange service" or "exchange access" traffic – and interexchange traffic is neither.²⁰³⁰ However, as long as an interconnecting carrier is using the section 251(c)(2) interconnection arrangement to exchange some telephone exchange service and/or exchange access traffic, section 251(c)(2) does not preclude that carrier from relying on that same functionality to exchange other traffic with the incumbent LEC, as well. This interpretation of section 251(c)(2) is consistent with the Commission's prior holding that carriers that otherwise have section 251(c)(2) interconnection arrangements are free to use them to deliver information services traffic, as well.²⁰³¹ Likewise, it is consistent with the Commission's interpretation of the unbundling obligations of section 251(c)(3), where it held that, as long as a carrier is using an unbundled network element (UNE) for the provision of a telecommunications service for which UNEs are available, it may use that UNE to provide other services, as well.²⁰³² With respect to the broader use of section 251(c)(2) interconnection arrangements, however, it will be necessary for the interconnection agreement to specifically address such usage to, for example, address the associated compensation.²⁰³³

973. *No Blocking.* In addition to the protections discussed above to prevent unilateral actions disruptive to the transitional VoIP-PSTN intercarrier compensation regime, we also find that carriers' blocking of VoIP calls is a violation of the Communications Act and, therefore, is prohibited just as with the blocking of other traffic.²⁰³⁴ As such, it is appropriate to discuss the Commission's general policy

²⁰³⁰ *Local Competition First Report and Order*, 11 FCC Rcd at 15598-99, paras. 190-91.

²⁰³¹ *Id.* at 15990, para. 995 ("We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well.").

²⁰³² *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2550, para. 29 n.83 (2005) (*Triennial Review Remand Order*).

²⁰³³ For example, this would include provisions addressing the intercarrier compensation for any toll VoIP-PSTN traffic delivered via a section 251(c)(2) interconnection arrangement. We note that some carriers appear to have implemented such an approach already. See, e.g., Level 3 Aug. 18, 2008 *Ex Parte* Letter, Attach. 1, Part C at 2 (Level 3-Embarq interconnection agreement providing that: "After the Parties implement interconnection arrangements for the exchange of Local Traffic, ISP-Bound Traffic, interLATA traffic and intraLATA traffic over the same interconnection trunks, Level 3 may also send VOIP Traffic, as defined below, over those trunks").

²⁰³⁴ See *supra* Section XI.B, para. 734.

against the blocking of such traffic.²⁰³⁵ As the Commission has long recognized, permitting blocking or the refusal to deliver voice telephone traffic,²⁰³⁶ whether as a means of “self-help” to address perceived unreasonable intercarrier compensation charges or otherwise, risks “degradation of the country’s telecommunications network.”²⁰³⁷ Consequently, “the Commission, except in rare circumstances[,] . . . does not allow carriers to engage in call blocking”²⁰³⁸ and “previously has found that call blocking is an unjust and unreasonable practice under section 201(b) of the Act.”²⁰³⁹ Although the Commission generally has not classified VoIP services, as discussed above, the exchange of VoIP-PSTN traffic implicating intercarrier compensation rules typically involves two carriers.²⁰⁴⁰ As a result, those carriers are directly bound by the Commission’s general prohibition on call blocking with respect to VoIP-PSTN traffic, as with other traffic.

974. We recognize, however, that blocking also could be performed by interconnected VoIP providers, or by providers of “one-way” VoIP service that allows customers to receive calls from, or place calls to the PSTN, but not both. Just as call blocking concerns regarding interexchange carriers and wireless providers arose in an effort to avoid high access charges, VoIP providers likewise could have incentives to avoid such rates, which they would pay either directly or through the rates they pay for wholesale long distance service.²⁰⁴¹ If interconnected VoIP services or one-way VoIP services are telecommunications services, they already are subject to restrictions on blocking under the Act. If such services are information services,²⁰⁴² we exercise our ancillary authority and prohibit blocking of voice traffic to or from the PSTN by those providers just as we do for carriers.²⁰⁴³

²⁰³⁵ The Commission has sought comment on whether a shift from a tariffing regime to a regime relying on commercial arrangements for intercarrier compensation could create incentives for blocking. *Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9656-57, para. 130.

²⁰³⁶ By this, we mean “block[ing], chok[ing], reduc[ing] or restrict[ing] traffic in any way.” *Call Blocking Declaratory Ruling*, 22 FCC Rcd 11629, 11631, para. 6.

²⁰³⁷ *Access Charge Reform Seventh R&O and NPRM*, 16 FCC Rcd at 9932-33 para. 24.

²⁰³⁸ *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11632, para. 7. As the Commission noted, the *Call Blocking Declaratory Ruling* had “no effect on the right of individual end users to choose to block incoming calls from unwanted callers.” *Id.* at para. 7 n.21.

²⁰³⁹ *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11631, para. 5.

²⁰⁴⁰ See *supra* note 1969 and accompanying text.

²⁰⁴¹ See, e.g., *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11629.

²⁰⁴² We do not decide the classification of such services in this Order.

²⁰⁴³ For example, an interexchange carrier that is a wholesale partner of such a VoIP provider could evade our directly-applicable restrictions on blocking under section 201 of the Act by having the blocking performed by the VoIP provider instead. An IXC generally would be prohibited from refusing to deliver calls to telephone numbers associated with high intercarrier compensation charges. If that IXC’s VoIP provider wholesale customer were free to block calls to such numbers, the IXC thus could evade the directly-applicable restrictions on blocking (and the VoIP provider would benefit from lower wholesale long distance costs to the extent that, for example, its agreement provided for a pass-through of the intercarrier compensation charges paid by the IXC). In addition, blocking or degrading of a call from a traditional telephone customer to a customer of a VoIP provider, or vice-versa, would deny the traditional telephone customer the intended benefits of telecommunications interconnection under section 251(a)(1).

(ii) Other Pending Matters

975. Our conclusions in this Order effectively address, in whole or in part, certain pending petitions. For one, Global NAPS filed a petition for declaratory ruling regarding the manner and extent to which VoIP traffic could be subject to access charges generally, and intrastate access charges in particular.²⁰⁴⁴ AT&T also filed a petition requesting that, on a transitional basis, the Commission declare that interstate and intrastate access charges may be imposed on VoIP traffic in certain circumstances, as well as limited waivers that would enable it to offset forgone revenues from voluntary reductions in intrastate terminating access charges.²⁰⁴⁵ In addition, Vaya Telecom (Vaya) filed a petition seeking a declaration that “a LEC’s attempt to collect intrastate access charges on LEC-to-LEC VoIP traffic exchanges is an unlawful practice.”²⁰⁴⁶ Because our transitional intercarrier compensation framework for VoIP-PSTN declines to apply all existing intercarrier compensation regimes as they currently exist, Global NAPS’s and Vaya’s petitions are granted in part and AT&T’s is denied in part.²⁰⁴⁷ To the extent that AT&T proposes a specific approach for alternative rate reforms and revenue recovery, we find the mechanisms adopted in this Order to be more appropriate for the reasons discussed above, and thus deny its requests in that regard.²⁰⁴⁸ Further, Grande filed a petition seeking a Commission declaration that carriers categorically may rely on a customer’s certification that traffic originated in IP and therefore is enhanced and not subject to access charges.²⁰⁴⁹ To the extent that this would deviate from the regime we adopt, the petition is denied.²⁰⁵⁰ We decline to address the classification of VoIP services generally at this time, nor do we otherwise elect to grant the other requests for declaratory rulings raised by the Global NAPS, Vaya, AT&T, and Grande petitions.²⁰⁵¹

XV. INTERCARRIER COMPENSATION FOR WIRELESS TRAFFIC**A. Introduction**

976. In this section, we address compensation for non-access traffic exchanged between LECs and CMRS providers. As discussed further below, two compensation regimes currently apply to non-access LEC-CMRS traffic. Under section 20.11, LECs have a duty to provide interconnection to CMRS providers and LECs and CMRS providers must pay each other “reasonable compensation” in connection with traffic that originates on the other’s network.²⁰⁵² Under the reciprocal compensation regime in

²⁰⁴⁴ See Global NAPS Petition for Declaratory Ruling and for Preemption of the PA, NH and MD State Commissions, WC Docket No. 10-60 (filed Mar. 5, 2010).

²⁰⁴⁵ See AT&T Petition for Interim Declaratory Ruling and Limited Waivers, WC Docket No. 08-152 (filed July 17, 2008).

²⁰⁴⁶ Petition of Vaya Telecom, Inc. Regarding LEC-to-LEC VoIP Traffic Exchanges, CC Docket No. 01-92 at 1 (filed Aug. 26, 2011).

²⁰⁴⁷ See generally *supra* Section XIV.C.1.

²⁰⁴⁸ See *supra* Section XIII.

²⁰⁴⁹ See Grande Petition for Declaratory Ruling, WC Docket No. 05-283 (filed Oct. 3, 2005).

²⁰⁵⁰ See generally paras. 964-966 (establishing an approach under which terminating carriers can use interconnection agreements to obtain compensation for toll VoIP-PSTN traffic, including a means to identify VoIP-PSTN traffic).

²⁰⁵¹ It is well-established that the Commission has broad discretion whether to issue such a ruling. See 47 C.F.R. § 1.2; *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (Commission did not abuse its discretion by declining to grant a declaratory ruling.).

²⁰⁵² 47 C.F.R. § 20.11.

section 251(b)(5), LECs have an obligation to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic,²⁰⁵³ and CMRS providers that have entered into a reciprocal compensation arrangement with a LEC must compensate the LEC for terminating traffic originating on the CMRS provider's network.²⁰⁵⁴

977. The Commission has not addressed the relationship between these two regimes and has not clarified what "reasonable compensation" pursuant to 20.11 means. As a result, application of these provisions has been a continuing and growing source of confusion and dispute. Moreover, following the Commission's 2009 *North County Order*, which addressed a competitive LEC's complaint against a CMRS provider seeking "reasonable compensation" under section 20.11, requests to clarify this area of intercarrier compensation have increased.²⁰⁵⁵ The *North County Order* held that the state public utility commission was the appropriate forum under the rule for determining a reasonable rate for termination of the CMRS provider's intrastate, intraMTA traffic, and also declined to establish any federal methodology governing how the state should determine a reasonable rate.²⁰⁵⁶ CMRS providers have raised concerns that as a result, costly litigation is proliferating and the incidence of intraMTA traffic stimulation is growing.²⁰⁵⁷

978. As part of our comprehensive ICC reform, we believe it is now appropriate for the Commission to clarify the system of intercarrier compensation applicable to non-access traffic exchanged between LECs and CMRS providers. Accordingly, as described herein, we clarify that the compensation obligations under section 20.11 are coextensive with the reciprocal compensation requirements under section 251. In addition, consistent with our overall reform approach, we adopt bill-and-keep as the default compensation for non-access traffic exchanged between LECs and CMRS providers. To ease the move to bill-and-keep for rural, rate-of-return regulated LECs we adopt an interim default rule limiting their responsibility for transport costs for this category of traffic. We find that these steps are consistent with our overall reform and will support our goal of modernizing and unifying the intercarrier compensation system.

979. We also address certain pending issues and disputes regarding what is now commonly known as the intraMTA rule, which provides that traffic between a LEC and a CMRS provider that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations rather than interstate or intrastate access charges.²⁰⁵⁸ We resolve two issues that have been raised before the Commission regarding the correct application of this rule to specific traffic patterns. First, one wireless service provider claims that calls that it receives from other carriers, routes through its own base stations, and passes on to third-party carriers for termination have "originated" at its

²⁰⁵³ 47 U.S.C. § 251(b)(5); *see also* 47 C.F.R. § 51.703.

²⁰⁵⁴ *See Local Competition First Report and Order*, 11 FCC Rcd at 16016-18, paras. 1041-45. Specifically, the Commission determined that, pursuant to section 251(b)(5), CMRS providers will "receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation for certain traffic that they transmit and terminate to other carriers." *Id.* at 16018, para. 1045.

²⁰⁵⁵ *See North County Communications Corp. v. MetroPCS California, LLC*, Order on Review, 24 FCC Rcd 14036 (2009) (*North County Order*), *aff'd*, *MetroPCS California LLC v. FCC*, 644 F.3d 410 (D.C. Cir. 2011).

²⁰⁵⁶ *See North County Order*, 24 FCC Rcd at 14036-37, para. 1, 14044, para. 21.

²⁰⁵⁷ *See, e.g.*, CTIA Section XV Comments at 4.

²⁰⁵⁸ *See Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036; *see also* 47 C.F.R. § 24.202(a) (defining the term "Major Trading Area").

own base stations for purposes of applying the intraMTA rule.²⁰⁵⁹ As explained below, we disagree. Second, we affirm that all traffic routed to or from a CMRS provider that, at the beginning of a call, originates and terminates within the same MTA, is subject to reciprocal compensation, without exception. In addition to these clarifications, we also deny requests that the intraMTA rule be modified to encompass a larger geographic license area, the regional economic area grouping, or REAG.²⁰⁶⁰

B. Background

980. There are currently two regimes affecting intercarrier compensation for non-access traffic exchanged between LECs and CMRS providers. Before the 1996 Act was passed, the Commission, pursuant to section 332 and 201(a) of the Act, adopted rule 20.11 to govern LEC interconnection with CMRS providers.²⁰⁶¹ Section 20.11(a) required a LEC to provide the type of interconnection reasonably requested by a CMRS provider, and section 20.11(b) required mutual and reasonable compensation for the exchange of traffic between LECs and CMRS providers.²⁰⁶² In particular, Section 20.11(b) required the originating carrier, whether LEC or CMRS provider, to pay “reasonable compensation” to the terminating carrier in connection with traffic that terminates on the latter’s network facilities.²⁰⁶³

981. As noted elsewhere, section 251(b)(5), part of the 1996 Act, obligates LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications.²⁰⁶⁴ In the *Local Competition First Report and Order*, the Commission determined that, pursuant to that provision, “traffic to or from a CMRS network that originates and terminates within the same MTA is subject to [reciprocal compensation obligations] under section 251(b)(5) rather than interstate and intrastate access charges.”²⁰⁶⁵

982. At the same time, the Commission amended section 20.11 to provide that LECs and CMRS providers “shall also comply with applicable provisions of part 51 of this chapter.”²⁰⁶⁶ Thus, the “reasonable compensation” requirements under section 20.11 continued to apply in parallel with the new

²⁰⁵⁹ Letter from W. Scott McCollough, Counsel for Halo Wireless, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Attach. at 9 (filed Aug. 12, 2011) (Halo Aug. 12, 2011 *Ex Parte* Letter); Letter from W. Scott McCollough, Counsel for Halo Wireless, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (filed Oct. 17, 2011) (Halo Oct. 17, 2011 *Ex Parte* Letter). *But see* Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-92, Attach. at 7 (filed July 18, 2011) (NTCA July 18, 2011 *Ex Parte* Letter); ERTA July 8, 2011 *Ex Parte* Letter at 1, 3; NECA et al. Sept. 23, 2011 *Ex Parte* Letter at 1.

²⁰⁶⁰ T-Mobile August 3 PN Comments at 11-14.

²⁰⁶¹ See *Implementation of Sections 3(n) and 332 of the Communications Act and Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1499, paras. 231-32 (1994) (*CMRS Second Report and Order*) (subsequent history omitted). Section 332(c)(1)(B) provides in part that “[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act.” 47 U.S.C. § 332(c)(1)(B).

²⁰⁶² *CMRS Second Report and Order*, 9 FCC Rcd at 1498, paras. 231-32; see also 47 C.F.R. § 20.11(a), (b).

²⁰⁶³ 47 C.F.R. § 20.11(b).

²⁰⁶⁴ 47 U.S.C. § 251(b)(5); see Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). See also *Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1041.

²⁰⁶⁵ *Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036; see also 47 C.F.R. § 51.701(b)(1).

²⁰⁶⁶ 47 C.F.R. § 20.11(c).

obligations under section 251(b)(5) and implementing rules in Part 51.²⁰⁶⁷ The Commission has not, however, clarified what “reasonable compensation” pursuant to section 20.11 means.

983. The Commission’s decision not to interpret “reasonable compensation” has led to disputes. In 2009, the Commission addressed a complaint brought by North County Communications Corp. (North County), a competitive LEC, against MetroPCS California, LLC (MetroPCS), a CMRS provider, alleging that although there was no compensation agreement between the parties, MetroPCS had violated section 20.11(b) of the Commission’s rules by failing to pay reasonable compensation to North County for terminating its traffic and asking the Commission to prescribe a termination rate and award appropriate damages.²⁰⁶⁸

984. In an Order reviewing an earlier decision by the Enforcement Bureau, the Commission affirmed the Bureau’s finding that the California PUC was the more appropriate forum for determining a reasonable termination rate under section 20.11 for the intrastate traffic at issue and that the competitive LEC therefore was required to obtain a rate determination by the state before its section 20.11 claim before the Commission could proceed.²⁰⁶⁹ In declining to establish an applicable rate, the Commission noted its previous decision to interpret section 20.11 to preserve state authority over intrastate traffic and concluded that if the Commission decides to depart from this precedent, it should do so in “a more general rulemaking proceeding.”²⁰⁷⁰ The Commission also declined to provide guidance to the California PUC about how to establish a reasonable termination rate.²⁰⁷¹ The U.S. Court of Appeals for the D.C. Circuit upheld the Commission’s decision, finding that even if the Commission had authority under sections 201 and 332 of the Act to regulate intrastate rates for mobile termination, the Commission was not required to exercise this authority in every instance.²⁰⁷² The court also noted with approval the Commission’s determination to defer reconsideration of its policy under section 20.11 to a general rulemaking proceeding.²⁰⁷³

985. CMRS providers have argued that the Commission’s *North County Order*, by declining to determine reasonable compensation under section 20.11 and deferring such determinations to the states without providing any guidance, has caused the problem of traffic stimulation to grow. They argue that the Commission’s decision has led to competitive LECs seeking terminating compensation rates far above cost and to a dramatic increase in litigation as competitive LECs seek to establish or enforce termination rates in state administrative and judicial forums.²⁰⁷⁴ They have asked the Commission to address the issue as part of its comprehensive effort to reform the intercarrier compensation system.

²⁰⁶⁷ See 47 C.F.R. §§ 51.701-51.717; *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, 4863, para. 14 (2005) (*T-Mobile Order*), petitions for review pending, *Ronan Tel. Co. et al. v. FCC*, No. 05-71995 (9th Cir. filed Apr. 8, 2005). We address pending petitions for reconsideration of these provisions elsewhere in this order.

²⁰⁶⁸ *North County Order*, 24 FCC Rcd at 14040, para. 12.

²⁰⁶⁹ *Id.*

²⁰⁷⁰ *Id.* at 14039, para. 10, 14042, para. 16 (internal quotations omitted).

²⁰⁷¹ *Id.* at 14044, para. 21. The U.S. Court of Appeals for the D.C. Circuit subsequently upheld the Commission’s decision. *MetroPCS California v. FCC*, 644 F.3d 410.

²⁰⁷² *MetroPCS California v. FCC*, 644 F.3d at 412, 414.

²⁰⁷³ *Id.* at 414.

²⁰⁷⁴ See CTIA Section XV Comments at 4 (asserting that the *North County Order* has “reduced the LECs’ incentives to negotiate reasonable agreements and created confusion among state commissions and federal courts, leading to an (continued...)”).

986. In the *USF/ICC Transformation NPRM*, we sought comment on a number of issues relating to the reform of our rules regulating wireless termination charges. As part of a general reduction of intercarrier compensation rates to eventually eliminate per-minute rates, we sought comment on whether to set a specific rate for wireless termination charges, and whether we should address certain pending compensation disputes, including disputes over the application of section 20.11.²⁰⁷⁵ We also sought comment on allegations that traffic stimulation involving reciprocal compensation between CMRS providers and competitive LECs was increasing,²⁰⁷⁶ and we sought comment on the steps that could be taken to address this activity.²⁰⁷⁷ We also sought comment on the impact of the *North County* decisions on traffic stimulation and asked whether, as an interim measure, we should adopt any procedural or substantive rules governing competitive LEC-CMRS compensation arrangements under section 20.11 of the Commission's rules, such as establishing a default compensation rate.²⁰⁷⁸

987. We also sought comment on the proper interpretation of the intraMTA rule, which provides that traffic between a LEC and a CMRS provider that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations rather than interstate or intrastate access charges.²⁰⁷⁹ The Commission had previously sought comment on this question in 2005, finding that rural LECs took the position that traffic between a LEC and a CMRS provider that must be routed through an IXC should be treated as access traffic even if it is intraMTA, while CMRS providers argued that all such traffic was subject to reciprocal compensation.²⁰⁸⁰ In the *USF/ICC Transformation NPRM*, we invited parties to refresh the record, and sought comment on how issues involving the intraMTA rule were affected by our broader proposals for intercarrier compensation reform.²⁰⁸¹

C. LEC-CMRS Non-Access Traffic

988. Given our adoption of a uniform, federal framework for comprehensive intercarrier compensation reform, we believe it is now appropriate to clarify the system of intercarrier compensation applicable to non-access traffic exchanged between LECs and CMRS providers. First, we clarify that the scope of compensation obligations under section 20.11 are coextensive with the scope of the reciprocal compensation requirements under section 251 of the Act. Next, we exercise our authority to set a pricing
(Continued from previous page)

upsurge in costly litigation"); Leap Section XV Comments at 5; MetroPCS Section XV Comments at 11-12 (asserting CMRS providers must "continuously monitor innumerable LEC and CLEC filings at the state level and be compelled to defend themselves against unreasonable rates before 50 separate state utilities commissions); Sprint Nextel Section XV Comments at 22 (between 2009 and 2010, charges for Sprint Nextel's intraMTA traffic terminating to Tekstar increased by 71 percent); Verizon Section XV Comments at 36-39 ("[T]raffic pumping schemes have flourished in the wake of the *North County Order*, which opened the door to pumping of intraMTA CMRS traffic by CLECs.").

²⁰⁷⁵ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4721-22, paras. 539, 540.

²⁰⁷⁶ *Id.* at 4771, para. 672 (citing CTIA Aug. 26, 2010 *Ex Parte* Letter, Attach. at 5).

²⁰⁷⁷ *Id.*

²⁰⁷⁸ *Id.* at 4771, para. 673 (citing Letter from Tamara Preiss, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket no. 01-92, WC Docket No. 07-135 at 3 (filed June 28, 2010) (Verizon June 28, 2010 *Ex Parte* Letter) (proposing an immediate rate of \$0.0007/minute for all intraMTA CLEC-CMRS traffic)).

²⁰⁷⁹ *Id.* at 4777, para. 684.

²⁰⁸⁰ See *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4744-46, paras. 134-38.

²⁰⁸¹ *Id.* The Commission also sought comment in 2005 on whether to eliminate or modify the intraMTA rule. See *id.*

methodology for LEC-CMRS intraMTA traffic and adopt bill-and-keep as the immediately applicable default compensation methodology for non-access traffic between LECs and CMRS providers under section 20.11 and Part 51 of our rules.

989. As outlined above, two compensation regimes currently apply to non-access LEC-CMRS traffic, and the Commission has not clarified the intersection between the two.²⁰⁸² We conclude, based on the record, that it is appropriate for the Commission to clarify the relationship between the obligations in sections 20.11 and 251(b)(5).

990. To bring the 20.11 and section 251 obligations in line, we first harmonize the scope of the compensation obligations in section 20.11 and those in Part 51. We accordingly conclude that section 20.11 applies only to LEC-CMRS traffic that, since the *Local Competition First Report and Order*, has been subject to the reciprocal compensation framework under section 251(b)(5) of the Act. Thus, section 20.11 does not apply to access traffic that, prior to this Order, was subject to section 251(g). Furthermore, we clarify that the terms “mutual compensation” in section 20.11 and “reciprocal compensation” in section 251(b)(5) and Part 51 are synonymous when applied to non-access LEC-CMRS traffic.²⁰⁸³

991. Next, we find that it is in the public interest to establish a default federal pricing methodology for determining reasonable compensation under section 20.11. Commenters urge the Commission to address the current absence of guidance on compensation rates for traffic between competitive LECs and CMRS providers and to address the growing problem of traffic stimulation.²⁰⁸⁴ They argue that the decision in the *North County Order* to defer setting of reasonable compensation under section 20.11 for intrastate traffic to the states without providing any guidance has led to CLECs seeking terminating compensation rates far above cost and to a dramatic increase in litigation as CLECs seek to establish or enforce termination rates in state administrative and judicial forums.²⁰⁸⁵ They recommend that the Commission resolve this problem by establishing a default federal termination rate for CLEC-CMRS traffic of \$0.0007 or by adopting a bill-and-keep methodology.²⁰⁸⁶

²⁰⁸² See *supra* paras. 980-982.

²⁰⁸³ See 47 C.F.R. § 51.701(b)(2) (providing that traffic exchanged between a LEC and a CMRS provider is subject to reciprocal compensation if “at the beginning of the call, [it] originates and terminates within the same Major Trading Area”). Because they are coextensive, we use the terms “reciprocal compensation” and “mutual compensation” synonymously.

²⁰⁸⁴ See CTIA Section XV Comments at 4-5; Sprint Nextel Section XV Comments at 22; Verizon Section XV Comments at 35, 45. See also Leap Section XV Comments at 6 (traffic pumping involving reciprocal compensation rates for traffic between CMRS providers and LECs is “indeed increasing”); MetroPCS Section XV Comments at 2 (traffic pumping is a “growing problem” for wireless services); T-Mobile Section XV Comments at 4 (“T-Mobile has observed traffic stimulation involving intraMTA traffic, resulting from reciprocal compensation rates that exceed the actual costs of terminating traffic.”).

²⁰⁸⁵ See CTIA Section XV Comments at 4 (asserting that *North County* has “reduced the LECs’ incentives to negotiate reasonable agreements and created confusion among state commissions and federal courts, leading to an upsurge in costly litigation”); Leap Section XV Comments at 5; MetroPCS Section XV Comments at 11-12 (asserting CMRS providers must “continuously monitor innumerable LEC and CLEC filings at the state level and be compelled to defend themselves against unreasonable rates before 50 separate state utilities commissions”); Sprint Nextel Section XV Comments at 22 (between 2009 and 2010, charges for Sprint Nextel’s intraMTA traffic terminating to Tekstar increased by 71 percent); Verizon Section XV Comments at 36-39 (“[T]raffic pumping schemes have flourished in the wake of the *North County Order*, which opened the door to pumping of intraMTA CMRS traffic by CLECs.”).

²⁰⁸⁶ See Verizon Section XV Comments at 45 (arguing that “the Commission must close, once and for all, the longstanding gap in its intercarrier compensation regime and adopt rules to actually govern CMRS-CLEC intraMTA compensation arrangements,” and proposing a default rate of \$.0007); MetroPCS *USF/ICC Transformation NPRM* (continued...)

992. Currently, reciprocal compensation under the Part 51 rules is subject to a federal pricing methodology. Reciprocal compensation under section 20.11, however, is not currently subject to a federal pricing methodology. As we recently explained in the *North County Order*, we have instead traditionally regarded state commissions as the “more appropriate forum for determining the reasonable compensation rate [under section 20.11] for . . . termination of intrastate, intraMTA traffic,” and have to date declined to provide guidance to the states on how to carry out that responsibility.²⁰⁸⁷ We have long made clear, however, that we “would not hesitate to preempt any rates set by the states that would undermine the federal policy that encourages CMRS providers and LECs to interconnect.”²⁰⁸⁸ And we observed in the *North County Order* that the various “policy arguments” in favor of a greater federal role in implementing section 20.11 were “better suited to a more general rulemaking proceeding,” citing this proceeding in particular.²⁰⁸⁹

993. We now conclude, based on the record in this proceeding, that we should establish a federal methodology for implementing section 20.11’s reasonable compensation mechanism.²⁰⁹⁰ Although we believed in the *North County Order* that the interconnection process under section 20.11 would likely not be “procedurally onerous,”²⁰⁹¹ the record shows that the absence of a federal methodology has been a growing source of confusion and litigation.²⁰⁹² MetroPCS, for example, states that it is embroiled in disputes over traffic stimulation schemes in a number of jurisdictions and notes other proceedings in New York and Michigan. The California commission, the state commission implicated by the *North County Order*, also “recommends that the FCC provide guidance on what factors should be considered in setting a ‘reasonable rate’ for such arrangements.”²⁰⁹³ Adoption of a federal pricing methodology promotes the policy goals outlined in this Order of avoiding wasteful arbitrage opportunities caused by disparate intercarrier compensation rates and modernizing and unifying the intercarrier compensation system to promote efficiency and network investment.²⁰⁹⁴ It is also necessary (Continued from previous page)

Comments at 22 (proposing immediate bill-and-keep for all traffic to or from wireless carriers); see also Sprint Nextel Section XV Comments at 22 (arguing that CMRS-CLEC traffic should be subject to reciprocal compensation regime, and that in the absence of an interconnection agreement, all traffic should be subject to bill-and-keep).

²⁰⁸⁷ *North County Order*, 24 FCC Rcd at 14040, para. 12, 14044, para. 21.

²⁰⁸⁸ *MetroPCS California, LLC v. FCC*, 644 F.3d 410, 413 (D.C. Cir. 2011) (citing *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Servs.*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411, 1497, para. 228 (1994)).

²⁰⁸⁹ *North County Order*, 24 FCC Rcd at 14042, para. 16 (internal quotation marks omitted).

²⁰⁹⁰ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (holding that an agency need not show that “reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates”).

²⁰⁹¹ See *North County Order*, 24 FCC Rcd at 14041-42, para. 15.

²⁰⁹² See CTIA Section XV Comments at 4-5 & Attach. A; MetroPCS Section XV Comments at 9-10.

²⁰⁹³ CPUC Section XV Comments at 9.

²⁰⁹⁴ We note that *North County*, which argues that the Commission should continue to defer to the states to establish a rate for section 20.11 claims, has itself noted in another proceeding that the overall process under section 20.11 as a consequence of the current deferral to states is time-consuming and burdensome. See *North County Order*, 24 FCC Rcd at 14041-42, para. 15. See also California PUC Section XV Comments at 9 (recommending that the FCC provide guidance on setting a “reasonable rate” for such arrangements); RNK Section XV Comments at 12-13 (the Commission should provide a federal pricing methodology for reciprocal compensation between CMRS providers and CLECs, and states should implement that methodology).

to effectuate our decision to harmonize section 20.11 with section 251(b)(5), which, as noted, has long been governed by a federal pricing methodology.

994. We have already concluded above that a bill-and-keep methodology for intercarrier compensation, including reciprocal compensation, best serves our policy goals and requirements of the Act.²⁰⁹⁵ Consistent with that determination and our clarification above that compensation obligations under section 20.11 are coextensive with reciprocal compensation requirements, we conclude that bill-and-keep should also be the default pricing methodology between LECs and CMRS providers under section 20.11 of our rules.²⁰⁹⁶ Thus, we conclude that bill-and-keep should be the default applicable to LEC-CMRS reciprocal compensation arrangements under both section 20.11 or Part 51. We reject claims that a default rate set via a bill-and-keep methodology under any circumstances would be inadequate because it would be less than the actual cost of terminating calls that originate with a CMRS provider.²⁰⁹⁷ As we explain above, a bill-and-keep regime requires each carrier to recover its costs from its own end-users.²⁰⁹⁸

995. We further conclude that, under either section 20.11 or the Part 51 rules, for traffic to or from a CMRS provider subject to reciprocal compensation under either section 20.11 or the Part 51 rules, the bill-and-keep default should apply immediately. Although we have adopted a glide path to a bill-and-keep methodology for access charges generally and for reciprocal compensation between two wireline carriers, we find that a different approach is warranted for non-access traffic between LECs and CMRS providers for several reasons. First, we find a greater need for immediate application of a bill-and-keep methodology in this context to address traffic stimulation. The record demonstrates there is a significant and growing problem of traffic stimulation and regulatory arbitrage in LEC-CMRS non-access traffic.²⁰⁹⁹ In contrast, we find little evidence of such problems with regard to traffic between two LECs, where traffic stimulation appears to be occurring largely within the access regime, rather than for traffic currently subject to reciprocal compensation payments. This likely reflects in part the fact that the applicable “local calling area” for CMRS providers within which calls are subject to reciprocal

²⁰⁹⁵ See *supra* Section XII.A.1.

²⁰⁹⁶ By default, we mean that bill-and-keep will satisfy terminating compensation obligations except where carriers mutually agree to the contrary.

²⁰⁹⁷ North County Section XV Reply at 8, 9; see also, e.g., Core Section XV Comments at 13-14 (reciprocal compensation rates are set by state commissions pursuant to TELRIC, and use of a lower rate would require carriers to terminate traffic below cost, resulting in a windfall for originating carriers); Earthlink Section XV Reply at 11 (footnote omitted) (arguing that “a bill-and-keep arrangement does not ‘comply with the principles of mutual compensation’ under FCC Rule 20.11(b)”); PAETEC Section XV Reply at 23 (arguing that “[t]he Commission should not reverse rule 20.11 in this proceeding. Instead, the Commission should affirm the right to mutual compensation at reasonable rates”).

²⁰⁹⁸ See *supra* para. 742.

²⁰⁹⁹ See, e.g., MetroPCS Section XV Comments at 8 (“Access stimulation . . . is not confined to the long-distance market. The local terminating compensation market also has proven to be a troubling source of regulatory arbitrage.”), 11-12; Sprint XV Comments at 22 (noting an increase in intraMTA traffic pumping); Verizon Section XV Reply at 27 (“Verizon and other carriers have seen a large increase in intraMTA arbitrage in the wake of the Commission’s *North County Order*”). See also Letter from Scott Bergman, CTIA-The Wireless Association, to Marlene H. Dortch, Secretary, FCC, WC Docket 07-135, CC Docket 01-92 (filed Nov. 24, 2010); see generally Verizon June 28, 2010 *Ex Parte* Letter; Leap Wireless Access Stimulation NPRM Reply; MetroPCS Access Stimulation NPRM Comments.

compensation is much larger than it is for LECs.²¹⁰⁰ Thus, what would be access stimulation if between a LEC and an IXC will in many cases arise under reciprocal compensation when a CMRS provider is involved.²¹⁰¹ For similar reasons, CMRS providers are more likely to be exposed to traffic stimulation that is not subject to the measures we adopt above to address this problem within the access traffic regime. Further, although the record reflects that LEC-CMRS intraMTA traffic stimulation is growing most rapidly in traffic terminated by competitive LECs,²¹⁰² we are concerned that absent any measures to address traffic stimulation for intraMTA LEC-CMRS traffic, incumbent LECs that sought revenues from access stimulation may quickly adapt their stimulation efforts to wireless reciprocal compensation. For these reasons, we find addressing the traffic stimulation problem in reciprocal compensation is more urgent for LEC-CMRS traffic, and the bill-and-keep default methodology we adopt today should eliminate the opportunity for parties to engage in such practices in connection with such traffic.²¹⁰³

996. Although, as discussed above, we find that adopting a gradual glide path to a bill-and-keep methodology for intercarrier compensation generally, including reciprocal compensation between LECs, will help avoid market disruption to service providers and consumers, we conclude that an immediate transition for reciprocal compensation traffic exchanged between LECs and CMRS providers presents a far smaller risk of market disruption than would an immediate shift to a bill-and-keep methodology for intercarrier compensation more generally. First, for reciprocal compensation between CMRS providers and competitive LECs, we have until recently had no pricing methodology applicable to competitive LEC-CMRS traffic, as reflected in the fact that the carriers in the recent *North County Order* had specifically asked the Commission to establish one for the first time. Competitive LECs thus had no basis for reliance on such a methodology in their business models, and we see no reason why, in setting a methodology for the first time, we should not require competitive LECs to meet that methodology immediately, particularly given that competitive LECs are not subject to retail rate regulation in the manner of incumbents, and therefore have flexibility to adapt their businesses more quickly.

997. Even for incumbent LECs, we are confident the impact is not significant, particularly when balanced against the overall benefits of providing the clarification. For one, incumbent LECs and

²¹⁰⁰ More specifically, the area within which a LEC-CMRS call is subject to reciprocal compensation rather than access is the Major Trading Area (MTA), which is generally much larger than the applicable local calling area for LEC-LEC calls. See *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166, 11178 para. 31 (2000) (noting MTAs typically are large areas that may encompass multiple LATAs, and often cross state boundaries). Thus traffic that would be subject to access rules if exchanged between LECs falls under the reciprocal compensation regime when exchanged with a CMRS provider.

²¹⁰¹ See *Leap Wireless Access Stimulation NPRM Reply*, at 9 (arguing against proposals that “fail to even consider the circumstances in which the stimulated traffic is access traffic for landline carriers but intraMTA or ‘local’ traffic for the wireless carrier that originates the traffic”).

²¹⁰² See, e.g., *CTIA Access Stimulation NPRM Reply*, at 4 (“CLECs now account for more traffic stimulation than ILECs, as access stimulation schemes have shifted from ILECs to CLECs to avoid increased Commission oversight of rural ILECs.”).

²¹⁰³ See *Leap Wireless Access Stimulation NPRM Reply*, at 2 (asserting that traffic stimulation is a significant and growing problem in both access and local traffic and proposing adoption of bill-and-keep to address the problem). In light of our decision to adopt a default bill-and-keep methodology for traffic exchanged between LECs and CMRS providers, we find it is not necessary to adopt special rules proposed by some commenters to curb traffic stimulation with respect to such traffic. See, e.g., *CTIA Section XV Comments* at 7-8; *AT&T Section XV Comments* at 21; *Leap Section XV Comments* at 6-7; *MetroPCS Section XV Comments* at 4-5, 10; *T-Mobile Section XV Comments* at 8-9; *Verizon Section XV Reply Comments* at 31. Further, such measures would not be as effective in eliminating regulatory arbitrage schemes, as we note above. See also *Leap Wireless Access Stimulation NPRM Reply*, at 7 (“the only truly effectively global resolution of these issues is for the Commission to adopt bill and keep compensation for all traffic”).

CMRS providers that fail to pursue an interconnection agreement do not receive any compensation for intraMTA traffic today.²¹⁰⁴ For incumbent LECs that do have agreements for compensation for intraMTA traffic, most large incumbent LECs have already adopted \$0.0007 or less as their reciprocal compensation rate.²¹⁰⁵ For rate-of-return carriers, there is no allegation in the record that reforming LEC-CMRS reciprocal compensation obligations in this manner would have a harmful impact on them. And, in any event, we have adopted mechanisms that should address any such impacts. First, we adopt a new recovery mechanism, which includes recovery for net reciprocal compensation revenues, to provide all incumbent LECs with a stable, predictable recovery for reduced intercarrier compensation revenues.²¹⁰⁶ Second, we adopt an additional measure to further ease the move to bill-and-keep LEC-CMRS traffic for rate-of-return carriers. Specifically, we limit rate-of-return carriers' responsibility for the costs of transport involving non-access traffic exchanged between CMRS providers and rural, rate-of-return regulated LECs.

998. Some commenters proposed a rule allocating the responsibility for transport costs for non-access traffic to the non-rural terminating provider, stating that in the absence of such a rule, rural LECs could be forced to incur unrecoverable transport costs at a time when ICC reforms may already have a negative impact on network cost recovery.²¹⁰⁷ We recognize that immediately moving to a default bill-and-keep methodology for intraMTA traffic raises issues regarding the default point at which financial responsibility for the exchange of traffic shifts from the originating carrier to the terminating carrier.²¹⁰⁸ Therefore, in the attached FNPRM, we seek comment on whether and how to address this aspect of bill-and-keep arrangements.²¹⁰⁹ We find it appropriate, however, to establish an interim default rule allocating responsibility for transport costs applicable to non-access traffic exchanged between CMRS providers and rural, rate-of-return regulated LECs to provide a gradual transition for such carriers. Given our commitment to providing a measured transition, we believe it is appropriate to help ensure no flash cuts for rate-of-return carriers. We note that price cap carriers did not raise concerns about transport costs, and we conclude that no particular transition is required or warranted for traffic exchanged between

²¹⁰⁴ See *T-Mobile Order*, 20 FCC Rcd at 4863-65, paras. 14-16. See also *id.* at 4863 n.57 ("Under the amended rules, . . . in the absence of a request for an interconnection agreement, no compensation is owed for termination.").

²¹⁰⁵ See, e.g., *T-Mobile Section XV Comments* at n.16 (stating that "in T-Mobile's experience, the vast majority of RBOC agreements provide for terminating rates at or below \$0.0007 per minute").

²¹⁰⁶ For a detailed description of the recovery mechanism, see *supra* Section XIII.

²¹⁰⁷ See, e.g., *NECA et al. August 3 PN Comments* at 41-42 (proposing a "Rural Transport Rule"); see also Letter from Michael Romano, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket 10-90, CC Docket 01-92, at 6 (filed Oct. 19, 2011); Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 2 (filed Oct. 20, 2011).

²¹⁰⁸ *AT&T USF/ICC Transformation NPRM Reply* at 24-25. See also *CTIA USF/ICC Transformation NPRM Comments* at 39 (proposing that the originating carrier would be responsible for assuming the costs of delivering a call, including securing any necessary transport services, to the terminating carrier's network edge).

²¹⁰⁹ See *infra* Section XVII.N. We have previously sought comment on the allocation of transport costs for non-access traffic on several occasions. See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4774-76 paras. 680-82; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6619-20, App.C, para 270 (seeking comment on interconnection proposal including "rural transport rule" that would have limited the transport and provisioning obligations of a rural rate-of-return regulated incumbent LEC to its meet point when the non-rural terminating carrier's point of presence is located outside of the rural rate-of-return incumbent LEC's service area); *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4727 para. 90, 4729 para. 93 (seeking comment on a proposal to require competitive carriers seeking to exchange traffic with an incumbent LEC to be responsible for transport costs outside the incumbent's local calling area).

CMRS providers and these carriers.

999. Specifically, for such traffic, the rural, rate-of-return LEC will be responsible for transport to the CMRS provider's chosen interconnection point²¹¹⁰ when it is located within the LEC's service area.²¹¹¹ When the CMRS provider's chosen interconnection point is located outside the LEC's service area, we provide that the LEC's transport and provisioning obligation stops at its meet point and the CMRS provider is responsible for the remaining transport to its interconnection point. Although we do not prejudge our consideration of what allocation rule should ultimately apply to the exchange of all telecommunications traffic, including traffic that is considered access traffic today, under a bill-and-keep methodology, we believe that this rule is warranted for the interim period to help minimize disputes and provide greater certainty until rules are adopted to complete the transition to a bill-and-keep methodology for all intercarrier compensation.²¹¹²

1000. Beyond adopting these measures, we also emphasize that, although we establish bill-and-keep as an immediately applicable default methodology, we are not abrogating existing commercial contracts or interconnection agreements or otherwise allowing for a "fresh look" in light of our reforms.²¹¹³ Thus, incumbent LECs may have an extended period of time under existing compensation arrangements before needing to renegotiate subject to the new default bill-and-keep methodology. As a result, while we are concerned that an immediate transition from reciprocal compensation to a bill-and-keep methodology more generally would risk overburdening the universal service fund that underlies the interim recovery mechanism, we think that the impact on the fund resulting from an immediate transition for LEC-CMRS reciprocal compensation alone will not do so.²¹¹⁴ For the reasons discussed, we find that an immediate transition away from reciprocal compensation to a bill-and-keep methodology in this context is practical.

1001. As we found above, we believe that sections 251 and 252 affirmatively provide us authority to establish bill-and-keep as the default methodology applicable to traffic within the scope of section 251(b)(5), including for traffic exchanged between LECs and CMRS providers.²¹¹⁵ Further, as we have concluded above that we have authority under section 332 to regulate intrastate access traffic exchanged between LECs and CMRS providers and thus authority to specify a transition to bill-and-keep for such traffic, we conclude for similar reasons that we have authority to regulate intrastate reciprocal

²¹¹⁰ See 47 C.F.R. § 51.701(c)(defining transport as "from the interconnection point between the two carriers to the terminating carrier's end office switch").

²¹¹¹ See 47 U.S.C § 214(e)(5)(defining "service area" in the context of universal service).

²¹¹² We note that some commenters proposed a similar but broader rule that would have applied to traffic exchanged between a rural, rate-of-return LEC and any other provider, CMRS or not. See NECA et al. *August 3 PN Comments* at 41-42 (proposing a "Rural Transport Rule"); Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 2 (filed Oct. 20, 2011). Because we adopt this as an interim rule to address concerns arising from our immediate adoption of bill-and-keep for non-access traffic with CMRS providers, a narrower rule that applies only to traffic between rural, rate-of-return LECs and CMRS providers is warranted.

²¹¹³ See *supra* para. 815.

²¹¹⁴ Adoption of bill-and-keep for this subset of traffic will also inform our understanding of the potential impact that the larger transition to bill-and-keep will have and, although we do not envision any concerns arising based on the reforms adopted in this Order, would enable us, if necessary, to make any adjustments as part of that larger transition. See *MetroPCS Comments* at 22-23 (arguing that "[m]oving just wireless traffic immediately to bill-and-keep would provide a worthwhile reference without having a major disruptive effect on the intercarrier compensation regime" and supporting immediate application of bill-and-keep to LEC-CMRS traffic).

²¹¹⁵ See *supra* Section XII.A.2.

compensation between LECs and CMRS providers.²¹¹⁶ Indeed, in *Iowa Utilities Board*, the Eighth Circuit specifically upheld Commission rules regulating LEC-CMRS reciprocal compensation based on these provisions.²¹¹⁷

1002. In the *North County Order*, the Commission found that any decision to reverse course and regulate intrastate rates under section 20.11 at the federal level was more appropriately addressed in a general rulemaking proceeding.²¹¹⁸ Now that we are considering the issue in the context of this rulemaking proceeding, we find it appropriate to take this step for the reasons discussed above, and we conclude that our decision to establish a federal default pricing methodology for termination of LEC-CMRS intraMTA traffic as part of our broader effort in this proceeding to reform, modernize, and unify the intercarrier compensation system is consistent with our authority under the Act.

D. IntraMTA Rule

1003. In the *Local Competition First Report and Order*, the Commission stated that calls between a LEC and a CMRS provider that originate and terminate within the same Major Trading Area (MTA) at the time that the call is initiated are subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges.²¹¹⁹ As noted above, this rule, referred to as the “intraMTA rule,” also governs the scope of traffic between LECs and CMRS providers that is subject to compensation under section 20.11(b). The *USF/ICC Transformation NPRM* sought comment, *inter alia*, on the proper interpretation of this rule.

1004. The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule.

1005. We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers “Common Carrier wireless exchange services to ESP and enterprise customers” in which the customer “connects wirelessly to Halo base stations in each MTA.”²¹²⁰ It further

²¹¹⁶ See *supra* para. 779.

²¹¹⁷ In *Iowa Utilities Board v. FCC*, the Eighth Circuit found that “[b]ecause Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by [CMRS] providers . . . and because section 332(c)(1)(b) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers.” *Iowa Utils Bd. v. FCC*, 120 F. 3d 753, 800 n.21 (8th Cir. 1997) (vacating the Commission’s pricing rules for lack of jurisdiction except for “the rules of special concern to CMRS providers” based in part upon the authority granted to the Commission in 47 U.S.C. § 332(c)(1)(B)). See also *Qwest v. FCC*, 252 F.3d 462, 465-66 (D.C. Cir. 2001) (describing the Eighth Circuit’s analysis of section 332(c)(1)(B) in *Iowa Utils. Bd. v. FCC* and concluding that an attempt to relitigate the issue was barred by the doctrine of issue preclusion). On this basis, the court upheld several rules relating to reciprocal compensation for LEC-CMRS traffic, including rules governing charges for intrastate traffic. For example, the court upheld on this basis the adoption of section 51.703(b) of our rules, which prohibits LECs from assessing charges on any other telecommunications carrier for non-access traffic that originates on the LEC’s network. 47 C.F.R. § 51.703(b).

²¹¹⁸ *North County Order*, 24 FCC Rcd at 14039-40, para. 10, 14042, para. 16 (internal quotations omitted).

²¹¹⁹ *Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036; 47 C.F.R. § 51.701(b)(2). The definition of an MTA can be found in section 24.202(a) of the Commission’s rules. 47 C.F.R. § 24.202(a).

²¹²⁰ Halo Aug. 12, 2011 *Ex Parte* Letter, Attach. at 7; see also Halo Oct. 17, 2011 *Ex Parte* Letter. Halo is a nationwide licensee of non-exclusive spectrum in the 3650-3700 MHz band.

asserts that its “high volume” service is CMRS because “the customer connects to Halo’s base station using wireless equipment which is capable of operation while in motion.”²¹²¹ Halo argues that, for purposes of applying the intraMTA rule, “[t]he origination point for Halo traffic is the base station to which Halo’s customers connect wirelessly.”²¹²² On the other hand, ERTA claims that Halo’s traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers.²¹²³ NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used “in the middle,” this does not affect the categorization of the call for intercarrier compensation purposes.²¹²⁴ These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic.²¹²⁵ Responding to this dispute, CTIA asserts that “it is unclear whether the intraMTA rules would even apply in that case.”²¹²⁶

1006. We clarify that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules.²¹²⁷ Thus, we agree with NECA that the “re-origination” of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo’s contrary position.²¹²⁸

1007. In a further pending dispute, some LECs have argued that if completing a call to a CMRS provider requires a LEC to route the call to an intermediary carrier outside the LEC’s local calling area,²¹²⁹ the call is subject to access charges, not reciprocal compensation, even if the call originates and

²¹²¹ Halo Aug. 12, 2011 *Ex Parte* Letter, Attach. at 8.

²¹²² *Id.* Attach. at 9.

²¹²³ ERTA July 8, 2011 *Ex Parte* Letter, at 3.

²¹²⁴ NTCA July 18, 2011 *Ex Parte* Letter at 7.

²¹²⁵ NTCA July 18, 2011 *Ex Parte* Letter at 1; ERTA *Ex Parte* Letter at 1, 3 (traffic from Halo includes “millions of minutes of intrastate access, interstate access, and CMRS traffic originated by customers of other companies;” one day study of Halo traffic showed traffic was originated by customers of “176 different domestic and Canadian LECs and CLECs and 63 different Wireless Companies”).

²¹²⁶ CTIA August 3 *PN* Comments at 9.

²¹²⁷ See *Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp.*, Order on Reconsideration, 17 FCC Rcd 6275, 6276 para. 4 (2002) (“Answer Indiana’s argument assumes that GTE North receives reciprocal compensation from the originating carrier, but our reciprocal compensation rules do not provide for such compensation to a transiting carrier.”); *TSR Wireless, LLC v. U.S. West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166, 11177 n.70 (2000).

²¹²⁸ See NECA Sept. 23, 2011 *Ex Parte* Letter Attach. at 1; Halo Aug. 12, 2011 *Ex Parte* Letter at 9. We make no findings regarding whether any particular transiting services would in fact qualify as CMRS. See CTIA August 3 *PN* Comments at 9 & n.29 (“the information available does not reveal whether [Halo’s] offering is a mobile service”).

²¹²⁹ This occurs when the LEC and CMRS provider are “indirectly interconnected,” i.e. when there is a third carrier to which they both have direct connections, and which is then used as a conduit for the exchange of traffic between them.

terminates within the same MTA.²¹³⁰ One commenter in this proceeding asks us to affirm that such traffic is subject to reciprocal compensation.²¹³¹ We therefore clarify that the intraMTA rule means that all traffic exchanged between a LEC and a CMRS provider that originates and terminates within the same MTA, as determined at the time the call is initiated, is subject to reciprocal compensation regardless of whether or not the call is, prior to termination, routed to a point located outside that MTA or outside the local calling area of the LEC.²¹³² Similarly, intraMTA traffic is subject to reciprocal compensation regardless of whether the two end carriers are directly connected or exchange traffic indirectly via a transit carrier.²¹³³

1008. Further, in response to the *USF/ICC Transformation NPRM*, T-Mobile proposed that we expand the scope of the intraMTA rule to reflect the fact that CMRS licenses are now issued for REAGs, geographic areas that are larger than MTAs.²¹³⁴ T-Mobile notes that the intraMTA rule was promulgated

²¹³⁰ See, e.g., Letter from Sylvia Lesse, Counsel to the Missouri Companies, to William F. Caton, Acting Secretary, Federal Communications Commission, WT Docket No. 01-316 and CC Docket No. 01-92, Attach. (filed Mar. 22, 2002) (Missouri Companies Mar. 22 *Ex Parte* Letter); Letter from W.R. England, III, Counsel for Citizen Telephone Company of Missouri, et al, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, and 95-116 (filed Oct. 31, 2003) (Citizen Oct. 31, 2003 *Ex Parte* Letter). See also Letter from Glenn H. Brown, Counsel to Great Plains Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 8 (filed Sept. 23, 2003) (stating that the local exchange is the incumbent LEC's local service area rather than the MTA). We also sought comment on this issue in 2005 but have not since taken action to address it. See *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4745-46 paras. 137-38.

²¹³¹ T-Mobile August 3 PN Comments at 11.

²¹³² In a letter filed on Oct. 21, 2011, Vantage Point Solutions alleged "difficulties associated with the implementation of intraMTA local calling" between LECs and CMRS providers, and, while not advocating repeal of the rule, urged the Commission to "proceed with substantial caution" when "handling the rating and routing of intraMTA calls" that involve an interexchange carrier. Letter from Larry D. Thompson, Vantage Point Solutions, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 1-2 (filed Oct. 21, 2011) (Vantage Point Oct. 21, 2011 *Ex Parte* Letter). We find that the potential implementation issues raised by Vantage Point do not warrant a different construction of the intraMTA rule than what we adopt above. Although Vantage Point questions whether the intraMTA rule is feasible when a call is routed through interexchange carriers, many incumbent LECs have already, pursuant to state commission and appellate court decisions, extended reciprocal compensation arrangements with CMRS providers to intraMTA traffic without regard to whether a call is routed through interexchange carriers. See, e.g., *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619, 623-34 (8th Cir. 2007) (noting and affirming arbitration decision requiring incumbent LEC to compensate CMRS provider for costs incurred in transporting and terminating land-line to cell-phone calls placed to cell phones within the same MTA, even if those calls were routed through a long-distance carrier); *Atlas Telephone Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005). Further, while Vantage Point asserts that it is not currently possible to determine if a call is interMTA or intraMTA, Vantage Point Oct. 21, 2011 *Ex Parte* Letter at 2-3, the Commission addressed this concern when it adopted the rule. See *Local Competition First Report and Order*, 11 FCC Rcd at 16017, para. 1044 (stating that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples).

²¹³³ See Sprint Nextel Section XV Comments at 22-23 (arguing that the Commission should reaffirm that all intraMTA traffic to or from a CMRS provider is subject to reciprocal compensation). This clarification is consistent with how the intraMTA rule has been interpreted by the federal appellate courts. See *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619 (8th Cir. 2007); *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006); *Atlas Telephone Co. v. Oklahoma Corp. Commission*, 400 F.3d 1256 (10th Cir. 2005).

²¹³⁴ See T-Mobile August 3 PN Comments at 11-14. T-Mobile's proposal is also supported by MetroPCS. See MetroPCS August 3 PN Reply at 6-7.

at a time the MTA was the largest CMRS license area.²¹³⁵ T-Mobile argues that the REAG is currently the largest license being used to provide CMRS and that this change would move more telecommunications traffic under the reciprocal compensation umbrella pending the unification of all intercarrier compensation rates.²¹³⁶ We decline to adopt T-Mobile's proposal. Given the long experience of the industry dealing with the current rule, the very broad scope of the changes to the intercarrier compensation rules being made in this Order that will, after the transition period, make the rule irrelevant, and the limited support in the record for the suggested change even from CMRS commenters, we do not believe it is either necessary or appropriate to expand the scope of this rule as proposed by T-Mobile.

XVI. INTERCONNECTION

1009. Interconnection among communications networks is critical given the role of network effects.²¹³⁷ Historically, interconnection among voice communications networks has enabled competition and the associated consumer benefits that brings through innovation and reduced prices.²¹³⁸ The voice communications marketplace is currently transitioning from traditional circuit-switched telephone service to the use of IP services, and commenters observe that many carriers "apparently are equipped to receive IP voice traffic but are taking the position they will not use this equipment for years (until a prohibition on current per-minute charges takes effect)."²¹³⁹ These parties thus propose that in the immediate future the Commission "should (a) encourage all TDM network operators to investigate the steps they need to take to support IP-IP interconnection, and (b) put all TDM network operators on notice that they will be likely required to support IP-IP interconnection before any phase down of current ICC rates is complete."²¹⁴⁰

1010. We anticipate that the reforms we adopt herein will further promote the deployment and use of IP networks. However, IP interconnection between providers also is critical. As such, we agree with commenters that, as the industry transitions to all IP networks, carriers should begin planning for the transition to IP-to-IP interconnection, and that such a transition will likely be appropriate before the completion of the intercarrier compensation phase down. We seek comment in the accompanying FNPRM regarding specific elements of the policy framework for IP-to-IP interconnection. We make clear, however, that our decision to address certain issues related to IP-to-IP interconnection in the FNPRM should not be misinterpreted to suggest any deviation from the Commission's longstanding view

²¹³⁵ See T-Mobile August 3 PN Comments at 12.

²¹³⁶ *Id.* at 13.

²¹³⁷ See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket Nos. 04-70, 04-254, 04-323, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21578, para. 143 (2004) (citing Carl Shapiro and Hal Varian, *Information Rules*, Harvard Business School Press, Boston, 1999, at 13).

²¹³⁸ See, e.g., *Interconnection Clarification Order*, 26 FCC Rcd at 8265-66, paras. 12-13; *Local Competition First Report and Order*, 11 FCC Rcd at 15506, para. 4; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Third Report and Order, Transport Phase II, 9 FCC Rcd 2718, 2724, para. 25 (1994).

²¹³⁹ Sprint Nextel *USF/ICC Transformation NPRM* Comments at 28. See also, e.g., Letter from Howard J. Symons, counsel for Cablevision, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket No. 01-92, 96-45, GN Docket No. 09-51, Attach. at 1-4 (filed Oct. 20, 2011); Letter from Thomas Jones, counsel for Cbeyond et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 11-119, 10-90, 07-135, 05-337, 03-109, CC Docket No. 01-92, 96-45, GN Docket No. 09-51, Attach. A at 5 (filed Oct. 3, 2011).

²¹⁴⁰ Sprint Nextel *USF/ICC Transformation NPRM* Comments at 28.

regarding the essential importance of interconnection of voice networks.²¹⁴¹

1011. In particular, even while our FNPRM is pending, we expect all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic. The duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise. Moreover, we expect such good faith negotiations to result in interconnection arrangements between IP networks for the purpose of exchanging voice traffic. As we evaluate specific elements of the appropriate interconnection policy framework for voice IP-to-IP interconnection in our FNPRM, we will be monitoring marketplace developments, which will inform the Commission's actions in response to the FNPRM.²¹⁴²

XVII. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Broadband Public Interest Obligations

1012. In this section, we seek further comment on the public interest obligations of funding recipients.

1. Measuring Broadband Service

1013. In the Order, we adopt a rule requiring that actual speed and latency be measured on each ETC's access network from the end-user interface to the nearest Internet access point, and we require that ETCs certify to and report the results to USAC on an annual basis. Here, we seek comment on whether the Commission should adopt a specific measurement methodology beyond what is described in the Order and the format in which ETCs should report their results.

1014. The *Measuring Broadband America Report* concludes that "a standardized set of broadband measurements can be implemented across a range of ISPs and scaled to support detailed regional assessments of broadband deployment and performance."²¹⁴³ We note that commercial hardware and software as well as some free, non-commercial options are available. Should we adopt a uniform methodology for measuring broadband performance? If so, should that methodology be uniform across different technologies? We note that the Commission has requested more information on measurement approaches for mobile broadband and seeks to incorporate that proceeding's record with ours.²¹⁴⁴ How should wireless providers measure speed? Should we require fixed funding recipients to install SamKnows-type white boxes at consumer locations in order to monitor actual performance in a standardized way?

1015. Should we specify a uniform reporting format? Should test results be recorded in a format that can be produced to USAC and auditable such that USAC or the state commissions may confirm that a provider is, in fact, providing broadband at the required minimum speeds?

²¹⁴¹ See, e.g., *Interconnection Clarification Order*, 26 FCC Rcd at 8265-66, paras. 12-13; *CLEC Access Charge Order*, 16 FCC Rcd at 9960, para. 92; *Local Competition First Report and Order*, 11 FCC Rcd at 15506, para. 4; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Third Report and Order, Transport Phase II, 9 FCC Rcd 2718, 2724, para. 25 (1994); *MTS & WATS Market Structure*, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980); *Lincoln Tel. & Tel. Co.*, Declaratory Order, 72 FCC 2d 724 (1979). See also *infra* Section XVII.P.1.

²¹⁴² See *infra* Section XVII.P.

²¹⁴³ *Measuring Broadband America Report* at 28.

²¹⁴⁴ *Comment Sought on Measurement of Mobile Broadband Network Performance and Coverage*, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, Public Notice, 25 FCC Rcd 7069 (2010).

1016. Should providers be required to provide the underlying raw measurement data to USAC? Are there legitimate concerns with confidentiality if such data are made public? Is it sufficient to have a provider certify to USAC that its network is satisfying the minimum broadband metrics and retain the results of its own performance measurement to be produced on request in the course of possible future audits?

1017. Should we consider easing the performance measuring obligations on smaller broadband providers? If so, what would be the appropriate threshold for size of provider before granting relief for measuring broadband? If we ease performance measuring obligations on smaller broadband providers, how can we ensure that their customers are receiving reasonably comparable service?

2. Reasonably Comparable Voice and Broadband Services

1018. In the Order, we direct the Wireline Competition Bureau and Wireless Telecommunications Bureau (the Bureaus) to develop and conduct a survey of voice and broadband rates in order to compare urban and rural voice and broadband rates. Here, we seek comment on the components of the survey.

1019. With respect to determining reasonable comparability of voice service rates for universal service purposes, should we separately collect data on fixed and mobile voice telephony rates? Should fixed and mobile voice services have different benchmarks for purposes of reasonable comparability?

1020. In the landline context, we have previously surveyed the basic R-1 voice rate. What would the equivalent basic offering be in the mobile context? How should we take into account packages that offer varying numbers of minutes of usage and/or additional features such as texting?

1021. With respect to determining reasonable comparability of broadband services, should we separately collect data on fixed and mobile broadband pricing and capacity requirements (if any)? For purposes of that analysis, how should we consider, if at all, data cards provided by mobile providers?

1022. In the Order, we conclude that services meeting our public interest standard should be reasonably comparable to comparable offerings in urban areas in terms of pricing, speed, and usage limits (if any).²¹⁴⁵ For fixed broadband offerings subject to our initial CAF requirements of 4 Mbps downstream/1 Mbps upstream, should we survey advertised rates for such service, or the closest available offering in urban areas? How should we take into account promotional pricing that may require a specific contractual commitment for a period of time?

1023. Should fixed and mobile broadband services have different or the same benchmarks for purposes of reasonable comparability?

1024. We also seek comment on how to compare mobile broadband to fixed broadband as product offerings evolve over time.

1025. In the Order, we also determine that rural rates for broadband service would be “reasonably comparable” to urban rates under section 254(b)(3) if rural rates fall within a reasonable range of the national average urban rate for broadband service. Here, we seek comment on how specifically to define that reasonable range for broadband.

1026. We note that in the voice context, today we require states to certify that basic R-1 voice rates for non-rural carriers are no more than two standard deviations above the national average R-1

²¹⁴⁵ As explained in the Order, by limiting reasonable comparability to “comparable services,” we intend to ensure that fixed broadband services in rural areas are compared with fixed broadband services in urban areas, and similarly that mobile broadband services in rural areas are compared with mobile broadband services in urban areas.

rate.²¹⁴⁶ Would using two standard deviations be the appropriate measure for reasonable comparability in the broadband context, or should we adopt a different methodology for establishing such a reasonable range? Do unregulated broadband prices show relatively small variations, making another methodology more appropriate? For example, would prices normalized to disposable income be appropriate?

1027. Should we adopt a presumption that if a given provider is offering the same rates, terms and conditions (including capacity limits, in any) to both urban and rural customers, that is sufficient to meet the statutory requirement that services be reasonably comparable?

3. Additional Requirements

1028. Some commenters have proposed to require CAF recipients to comply with certain interconnection requirements.²¹⁴⁷ We seek comment on whether the Commission should require CAF recipients to offer IP-to-IP interconnection for voice service, beyond whatever framework it adopts more broadly.²¹⁴⁸ If so, what would the scope and nature of any such requirement be? Should any obligations be based on the requirements of section 251(a)(1), since, as ETCs, the providers subject to these requirements will be telecommunications carriers? How would any such obligations be enforced?

1029. We also seek additional comment on the proposal of Public Knowledge and the Benton Foundation that CAF recipients be required to make interconnection points and backhaul capacity available so that unserved high-cost communities could deploy their own broadband networks.²¹⁴⁹ How would such a requirement operate? Is it sufficient to require CAF recipients to negotiate in good faith with community broadband networks to determine a point of interconnection? If there are disputes, who should resolve them? Should there be reporting requirements associated with such an obligation (i.e., should CAF recipients be required to report annually on unfulfilled requests for interconnection from community broadband networks)? What benefits might such a requirement bring that the Commission's other universal service policies are not meeting? What would the costs of such a requirement be, on funding recipients and on administration of the requirement?

1030. We also seek comment on the proposal of Public Knowledge and the Benton Foundation that the Commission should create a fund for a Technology Opportunities Program in order to assist communities with deploying their own broadband networks. How much money should the Commission set aside for such a program? Are there any legal impediments to the Commission running such a pilot program out of the Universal Service Fund? We acknowledge the important role that WISPs, non-profits, and other small and non-traditional communications providers play in extending broadband in rural America, including in areas where traditional commercial providers have not deployed. Are there other things the Commission should be doing to enable such entities to further extend broadband coverage, particularly in currently unserved areas?

²¹⁴⁶ The standard deviation is a measure of dispersion. The sample standard deviation is the square root of the sample variance. The sample variance is calculated as the sum of the squared deviations of the individual observations in the sample of data from the sample average divided by the total number of observations in the sample minus one. In a normal distribution, about 68 percent of the observations lie within one standard deviation above and below the average and about 95 percent of the observations lie within two standard deviations above and below the average.

²¹⁴⁷ Public Knowledge and Benton *USF/ICC Transformation NPRM* Comments at 5-7; Hypercube *August 3 PN* Comments at 12-13.

²¹⁴⁸ See *infra* section XVII.P (IP-to-IP interconnection issues).

²¹⁴⁹ Public Knowledge and Benton *USF/ICC Transformation NPRM* Comments at 5-7; Letter from John Bergmayer, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed July 28, 2001); Public Knowledge and Benton *August 3 PN* Comments at 6-10.

B. Connect America Fund for Rate-of-Return Carriers

1031. In the Order, we establish the CAF and begin the transition of legacy high-cost universal service support to a broadband-focused CAF.²¹⁵⁰ We conclude that all universal high-cost support should ultimately be distributed through CAF for all recipients. Starting in 2012, rate-of-return carriers will receive CAF ICC support. In the near term, such carriers will receive the remainder of their universal service support through existing high-cost support mechanisms, as reformed in the Order.

1032. In response to the *USF/ICC Transformation NPRM*, the Rural Associations proposed the creation of a new broadband-focused CAF mechanism that ultimately would entirely replace existing support mechanisms for rate-of-return carriers. We sought comment in the *August 3rd Public Notice* on this proposal, but received limited response.²¹⁵¹ Subsequently, the Rural Associations provided draft rules that provide additional context regarding the operation of their proposed CAF.²¹⁵² We now seek focused comment on this proposal and ask whether and how it could be modified consistent with the framework adopted in the Order to provide a path forward for rate-of-return or carriers to invest in extending broadband to unserved areas. We set forth in Appendix G draft rules, modified to take into account the rule changes adopted in this Order, and seek comment on those draft rules.

1033. Under the Rural Association Plan, loop costs would be allocated to the interstate jurisdiction based on the current 25 percent allocator or the individual carrier's broadband adoption rate, whichever is greater. This would have the practical effect of reducing over time the size of legacy support mechanisms, like HCLS, that offset some intrastate costs. The new interstate revenue requirement would also include certain key broadband-related costs (*i.e.*, middle mile facilities and Internet backbone access). In conjunction with this proposal, the Rural Associations also propose that their authorized rate-of-return be reduced from 11.25 percent to 10 percent. CAF support would be provided under this new mechanism for any provider's broadband costs that exceeded a specified benchmark representing wholesale broadband costs in urban areas. In particular, under this proposal CAF funding would be computed by subtracting the product of an urban broadband transmission cost benchmark times the number of broadband lines in service, from the actual company broadband network costs (which would be the sum of last mile, second mile, middle mile, and Internet connection costs). The broadband transmission benchmark would have a fixed component that would increase from \$19.25 in the first year to \$24.75 in the eighth year, and a variable component that is tied to an individual company's broadband take rate. In addition, there would be certain provisions to mitigate the impact on companies that would receive reduced support under the modified mechanism. The purpose of the transitional stability mechanism would be to ensure that no study area would experience a reduction in total support of more than five percent, on an annual basis, which would be funded by carriers that receive a net increase in support.²¹⁵³

1034. The Rural Associations explain that their plan is calibrated to aim for a budget target of \$2.05 billion in combined funding for USF and their suggested access restructure mechanism in the first year of implementation, and may grow to \$2.3 billion by the sixth year. In the Order, we adopt an overall budget target for rate-of-return companies of \$2 billion over the next six years. Given that, how could we best accommodate the Rural Association Plan within the budgetary framework adopted today? If savings are realized in other components of the CAF—for example, if competitive bidding leads to less support

²¹⁵⁰ See *supra* Section VII.

²¹⁵¹ *August 3 Public Notice*, 26 FCC Rcd at 11112-11113.

²¹⁵² Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed Oct. 5, 2011).

²¹⁵³ Rural Associations *USF/ICC Transformation NPRM Comments* at 27-36.

being disbursed through the CAF for price cap areas than has been budgeted for—should those savings be used to increase funding for rate-of-return carriers under the Rural Association Plan? Could we more quickly transition existing support mechanisms to the framework proposed by the Rural Associations in order to stay within the overall budget? We seek year-by-year financial projections of any new mechanisms and the related impact on legacy support mechanisms, as well as the associated data and assumptions supporting those projections.

1035. With respect to plan specifics, we seek comment on the benefits and the costs of providing support for “middle mile” facilities and access to the Internet backbone under the Rural Associations’ proposal. On average for smaller carriers, approximately what proportion of the costs to deploy broadband networks and provide broadband services are attributable to middle mile and Internet backbone costs today? Commenters are encouraged to provide factual information to support any projections they submit into the record. Consistent with the overall framework adopted in the Order to impose reasonable limits on recovery of loop expenses, how could we impose a constraint on the recovery of middle mile costs under this proposal?²¹⁵⁴

1036. The Rural Associations propose that costs be shifted to the interstate jurisdiction based on an individual carrier’s “Broadband Take Rate,” which equals its total broadband lines divided by its total working access lines. Should this calculation be limited to residential lines? The Associations define “Broadband Line” to include any line that supports voice and broadband, or only broadband, at a minimum speed of 256 Kbps downstream. We seek comment on that proposal, and ask whether broadband lines should be defined consistent with the broadband characteristics required in our public interest obligations. What would be the impact of a more stringent definition of a broadband line in this context? If we were to adopt this proposal but shift costs to the interstate jurisdiction only for loops that provide speeds of at least 4 Mbps downstream and 1 Mbps upstream, how would that affect the financial projections regarding this proposal? Are there any legal, policy or practical implications to providing CAF support for lines where the end user customer does not subscribe to voice service from the ETC?²¹⁵⁵ The Rural Associations Plan contemplates that rate-of-return carriers may offer standalone broadband; to the extent they do so, absent any other rule changes, what would be the impact on USF support for rate-of-return carriers? What rule changes would help provide appropriate incentives for investment in broadband-capable networks, while limiting unrestrained growth in support provided to rate-of-return companies?

1037. How does the Rural Associations’ proposal to alter the current 25 percent allocation of loop costs fit within, or inform, the Federal-State Joint Board on Jurisdictional Separations’ ongoing work to reform the separations process?²¹⁵⁶ Are there components of the Rural Association plan that should be referred to the Separations Joint Board and examined directly in that ongoing process?

²¹⁵⁴ See *supra* Section VII.D.3 and *infra* Section XVII.E.

²¹⁵⁵ Today, incumbent local exchange carriers are required to allocate amounts recorded in their Part 32 accounts between regulated and nonregulated activities. 47 C.F.R. § 64.901. The costs and revenues allocated to nonregulated activities are excluded from the jurisdictional separations process. However, rate-of-return companies offer broadband transmission as a Title II common carrier service through a NECA tariff. The cost of loops that provide both voice and broadband is included in cost studies that determine whether and how much HCLS and ICLS a rate-of-return company receives.

²¹⁵⁶ *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 24 FCC Rcd 4227, 4229 (2009). Pursuant to section 36.154(a), 25 percent of the cost of cable and wire facilities used to provide voice telephony is deemed interstate, and 75 percent is deemed intrastate. Wholesale broadband transmission is considered a special access service, however, which is classified as 100 percent interstate.

(continued...)

1038. In the Order, we adopt a requirement that rate-of-return carriers offer speeds of 4 Mbps downstream and 1 Mbps upstream upon reasonable request. Should we adopt a rule that rate-of-return carriers are not required to serve any location within their study area that is served by an unsubsidized competitor and will not receive support for those lines to the extent they choose to extend service to areas of competitive overlap? How would we implement the Rural Associations' proposal in conjunction with such a rule? In particular, what would be the methodology for removing the broadband costs associated with areas of competitive overlap from the calculation of the proposed CAF support?

1039. Is a broadband urban wholesale benchmark the right approach to determine support under a new rate-of-return mechanism, or would another approach be more in keeping with the statute and our prior precedent? How does comparing wholesale urban costs relate to our obligation to ensure that rural retail rates are reasonable? Should such a benchmark be based on the wholesale cost of providing broadband, or another metric? Can wholesale broadband costs be calculated reliably, particularly where wholesale broadband services are not typically offered in urban areas? As an alternative, should the relevant benchmark be set based on the price of comparable retail services in a sample of urban areas?

1040. The Rural Associations' benchmark proposal contemplates a fixed and variable component of the rural benchmark. How should the Commission establish the levels for those components, and should there be a company-specific component of the benchmark? If the benchmark is tied in any manner to NECA tariff rates or another industry metric, does that proposal bear any risks of gamesmanship by carriers to raise or lower individual rates to maximize universal service receipts?

1041. What information would we need to require from carriers in order to evaluate and implement that Rural Association proposal? Prior to implementation, should we, for instance, require carriers to submit analyses showing their broadband adoption trends for service at varying speeds for the last five years in order for us to develop reasonable projections regarding broadband penetration in the future? What information should we obtain regarding their middle mile costs in order to better understand the implications of the proposal to include middle mile costs in support calculations?

1042. How would the proposed "transitional stability plan" mechanism operate? What would be the distributional impact of this proposal in terms of the number of companies that would see increases in support, compared to the number of companies that would see decreases in support?

1043. The Rural Associations propose that incremental broadband build-out commitments would be tied to an individual company's ability to receive incremental CAF support for new investment, subject to prospective capital investment constraints and the budget target adopted by the Commission. If the Commission were to adopt such an approach, what specific metrics or build-out milestones should be established, and what reporting and certifications should be imposed to improve the Commission's ability to enforce such commitments? How should CAF associated with intercarrier compensation reform be incorporated into any rate-of-return CAF mechanism? Would the public interest obligations for CAF associated with intercarrier compensation reform be updated to reflect any new obligations? We seek comment more broadly on how our universal service policies can best accelerate broadband deployment to consumers served by rate-of-return carriers, many of whom reside in rural America. In the long term, should universal service support for rate-of-return carriers be distributed through separate mechanisms from the mechanisms used to distribute support for other types of carriers, or is a uniform national approach preferable to achieve our universal service objectives? We seek comment on any other proposals to transition areas served by rate-of-return carriers to CAF, or any other analysis or recommendations that could facilitate this process.

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C. Interstate Rate of Return Represcription

1044. As explained in the Order, rate-of-return carriers will continue to receive for some time a modified version of their legacy universal service support. The level of support they receive depends, in part, on the interstate rate of return allowed for plant in service. As a result, we concluded it was necessary to evaluate the authorized interstate rate of return for rate-of-return carriers, which has not been updated in over 20 years.²¹⁵⁷ Three major associations representing rate-of-return carriers, as well as the State Members of the Federal-State Joint Board on Universal Service, have proposed a reduction in the current rate of return, which is currently set at 11.25 percent, in the context of overall reform.²¹⁵⁸ We agree that it is appropriate at this time to reexamine the rate of return as part of comprehensive reform of the universal service fund. We seek comment more generally on how this prescription fits within the broader reform framework for rate-of-return carriers, and specifically in what manner this prescription process should be linked to other proposals in this FNPRM, including the separate CAF support mechanism for rate-of-return carriers.²¹⁵⁹

1045. With respect to the prescription process itself, our statutory authority under section 205 provides “the power to determine and prescribe those elements that make up the charge,” including the interstate rate of return.²¹⁶⁰ The rate of return must be high enough to provide confidence in the “financial integrity” of the carrier, so that it can maintain its credit and attract capital.²¹⁶¹ The return should also be “commensurate with returns on investments in other enterprises having corresponding risks.”²¹⁶² On the other hand, “[t]he return should not be higher than necessary for this purpose.”²¹⁶³

1046. The Commission last prescribed the authorized interstate rate of return in 1990, reducing it from 12 percent to 11.25 percent.²¹⁶⁴ We believe fundamental changes in the cost of debt and equity since 1990 no longer allow us to conclude that a rate of return of 11.25 percent is necessarily “just and reasonable” as required by section 201(b).²¹⁶⁵ The rate-of-return carrier associations propose a reduction in the interstate rate of return from the current 11.25 percent to 10 percent.²¹⁶⁶ The State Members of the Federal-State Joint Board propose that the rate be reduced further to 8.5 percent.²¹⁶⁷ The State Members highlight that the interest rate on a three month Treasury Bill has fallen from 7.83 percent in 1990 to 0.15

²¹⁵⁷ This prescription will be limited to interstate common line and special access services as the rules adopted in the Order remove switched access services from rate-of-return regulation. See *supra* Section XIII.E.3.

²¹⁵⁸ ABC Plan Joint Letter Attachs. 1, 2; State Members *USF/ICC Transformation NPRM* Comments at 36-37.

²¹⁵⁹ See *supra* Section XVII.B.

²¹⁶⁰ *Nader v. FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975).

²¹⁶¹ *U.S. v. FCC*, 707 F.2d 610, 612 (D.C. Cir. 1983) (quoting *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)).

²¹⁶² *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1260 (D.C. Cir. 1993) (quoting *Hope Natural Gas Co.*, 320 U.S. at 603).

²¹⁶³ *U.S. v. FCC*, 707 F.2d at 612 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968)).

²¹⁶⁴ *1990 Prescription Order*, 5 FCC Rcd at 7532.

²¹⁶⁵ “All charges, practices, classifications, and regulations for an in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . .” 47 U.S.C. § 201(b).

²¹⁶⁶ Letter from Walter B. McCormick, Jr., US Telecom, to Chairman Genachowski, Commissioner Copps, Commissioner McDowell, and Commission Clyburn, WC Docket No. 10-90, at 2 (filed Jul. 29, 2011).

²¹⁶⁷ State Members *USF/ICC Transformation NPRM* Comments at 36-37.

percent in January 2011.²¹⁶⁸ Further, we observe that the average 10-year treasury constant maturity rate has declined from approximately 8.1 percent in January 1991 to approximately 2 percent in September 2011.²¹⁶⁹

1047. We find compelling evidence that our presently applied interstate rate-of-return, 11.25 percent, is no longer reflective of the cost of capital. We believe updating the rate of return is necessary for rate-of-return carriers to both attract capital on reasonable terms in today's markets and encourage economically sound network investments. We welcome input from state regulators that may have insights from conducting intrastate rate of return represcriptions in recent years. We also invite comment on how the Commission can ensure that the rate of return over time remains consistent with changes in the financial markets and cost of capital. We seek comment on means by which the rate of return can be adjusted automatically based on some set of financial triggers, and how any such triggers would operate.

1048. When it last initiated an interstate rate of return prescription proceeding in 1998, the Commission sought comment on the methods by which it could calculate incumbent LECs' costs of capital.²¹⁷⁰ Today, we seek comment on the issues raised in the *1998 Prescription Notice* generally and ask parties to provide the data responsive to the previous requests. In particular, we seek comment on the following:

1049. *WACC.* Weighted average cost of capital (WACC) identifies the rate of return required to maintain the current value of a firm; alternatively, it is the minimum rate of return the firm needs to offer to investors to maintain access to its current supply of capital. WACC is the key component for prescribing the rate of return. We seek comment on how to calculate the WACC for the relevant companies. We ask whether the formula to determine the WACC in sections 65.301-305 of the Commission's rules is the proper framework for this represcription, and whether any modification or update to the formula or inputs is warranted or necessary.²¹⁷¹ Specifically, the Commission's rules provide that WACC is the sum of the cost of debt, the cost of preferred stock, and the cost of equity, each weighted by its proportion in the capital structure.²¹⁷² Does this remain the correct approach? Should the Commission augment, or replace, its WACC calculation with any other analysis or approaches? Looking to the WACC calculated for an entire company, rather than for a specific line of business, is appropriate, for example, when thinking about setting an allowed rate-of-return for an entire company. In contrast, this overall WACC would not in general inform a business as to whether to undertake a specific project. Typically, specific projects that have greater risk and therefore a greater cost of capital than the entire company are only undertaken when much higher rates of return are expected. Given that many rate-of-return companies have diversified beyond regulated voice services, for example to offer broadband, video, or wireless services, should the WACC be computed for only the regulated portion of the company's business, or at the level of the entire company? We seek comment on this analysis, and how, if at all, it should impact our rate-of-return calculation, and use of WACC for these purposes.

1050. *Data.* We seek comment on the appropriate data and methodologies the Commission should use to calculate the WACC. We note that some of the formulas in the rules rely on ARMIS data,

²¹⁶⁸ See *id.* at n.79.

²¹⁶⁹ See 10-Year Treasury Constant Maturity Rate (GS10), Federal Reserve Bank of St. Louis, *available at* <http://research.stlouisfed.org/fred2/series/GS10> (last visited Oct. 21, 2011).

²¹⁷⁰ See *1998 Prescription Notice*, 13 FCC Rcd at 20563.

²¹⁷¹ 47 C.F.R. §§ 65.301-305.

²¹⁷² 47 C.F.R. § 65.305.

which are no longer collected.²¹⁷³ In the absence of ARMIS data, what additional data should the Commission require and rely upon, and who should be required to file the data? Are there other publicly available data that could provide the necessary information? Does the absence of any particular data necessitate a different approach to any of the necessary calculations?

1051. *Capital Structure.* Under the Commission's WACC calculation, the estimated cost of debt, preferred stock, and equity of a company are all weighted relative to their proportion in the firm's capital structure. A firm's capital structure can be measured on a "book" basis or "market" basis. We seek comment on whether the formula in section 65.304 of the Commission's rules based on book values remains the correct approach, and whether any modification to the formula or inputs is warranted or necessary.²¹⁷⁴ Are there other components of the cost of capital that should be included in the capital structure, and should any of the elements listed in the rules be excluded?

1052. *Surrogates.* Because the vast majority of rate-of-return carriers are not publicly traded, the Commission must select an appropriate set of surrogate firms, for which financial data is available publicly, to use as a basis for the cost of capital analysis. To do so, the Commission must select a group of companies for which there is available financial data and that face similar risks to rate-of-return carriers. The Commission's rules provide that the proper group of surrogates is all local exchange carriers with annual revenues equal to or above the indexed revenue threshold, which is \$146 million this year.²¹⁷⁵ In the 1998 *Prescription Notice* the Commission sought comment on what group of companies should be selected as surrogates and tentatively concluded at that time that the Regional Bell Operating Companies' (RBOCs) risk most closely resembled the risk encountered by the rate-of-return carriers.²¹⁷⁶ We seek comment on whether that group should be used as surrogates here, or whether another group of providers, for example smaller publicly traded carriers, not including the RBOCs, would better serve this purpose. Should the surrogate group include publicly traded rate-of-return companies only, or a mixture of publicly traded rate-of-return companies and smaller price-cap companies? Commenters proposing a particular surrogate group should clearly define that group, identify the publicly available financial data for that group, and explain how that group best reflects the business risks and cost of capital of rate-of-return carriers.

1053. *Cost of Debt.* A firm's cost of debt can be estimated by dividing its total annual interest expense by its average outstanding debt measured on a historic "book" basis, or alternatively, on a "market" basis using the current yield to maturity. We seek comment on the cost of debt formula in section 65.302 of the Commission's rules based on book values.²¹⁷⁷ We have previously noted that the "book" basis is more objectively ascertainable, but may not fully reflect current investor expectations. We seek comment on that assessment, and the relative weight either the "book" or "market" approach should be given in our calculations. The Commission's rules provide that this measurement should occur for the most recent two years.²¹⁷⁸ Is this the correct time period, or is a longer or shorter period warranted?

²¹⁷³ See, e.g., *Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 07-204, Memorandum Opinion and Order, 23 FCC Rcd 18483 (2008).

²¹⁷⁴ 47 C.F.R. § 65.304.

²¹⁷⁵ 47 C.F.R. § 65.300.

²¹⁷⁶ 1998 *Prescription Notice*, 13 FCC Rcd at 20570-71, paras. 19-20.

²¹⁷⁷ 47 C.F.R. § 65.302.

²¹⁷⁸ 47 C.F.R. § 65.302.